

18.1 1 FREDERICK STREET, ARTARMON - ARTARMON HOME HQ

ATTACHMENTS:	1. IMPLICATIONS 2. SIDE DEED
RESPONSIBLE OFFICER:	GREG MCDONALD – PLANNING & INFRASTRUCTURE DIRECTOR
AUTHOR:	DAVID DIBIASE – PROPERTY AND CONSTRUCTION SERVICES MANAGER
CITY STRATEGY OUTCOME:	4.1 – FACILITATE THE DEVELOPMENT OF ALL BUSINESSES
MEETING DATE:	10 SEPTEMBER 2018

1. PURPOSE OF REPORT

To seek Council's consent for the execution of a side deed to the existing 99 year ground lease between Council and Artarmon Retail Centre TC Pty Limited, for Council's old depot site at 1 Frederick Street, Artarmon.

2. OFFICER'S RECOMMENDATION

That Council:

- 1. Enter into the side deed to the lease for 1 Frederick Street, Artarmon, with MetLife Insurance K.K.**
- 2. Authorise the General Manager to execute the side deed and any other associated legal documents between Council and MetLife Insurance K.K.**
- 3. Advise MetLife Insurance K.K. that entering into the side deed does not imply lessor consent or planning consent for works at 1 Frederick Street, Artarmon and approvals, if required, would need to be separately sought.**

3. BACKGROUND

On the 5 May 2008, Council entered into a 99 year ground lease over its old depot site at 1 Frederick Street, Artarmon, with Artarmon Retail Centre TC Pty Limited (ARCTC).

Fortius Funds Management recently acquired ARCTC and has granted a mortgage over its leasehold interest and a general security deed over all its assets to MetLife Insurance K.K. (MIKK).

In accordance with the lease conditions, ARCTC is notifying Council, as Lessor, of it having granted a mortgage over its leasehold interest.

4. DISCUSSION

As a condition of the mortgage over the leasehold, MIKK as the mortgagor, has required ARCTC to approach Council and seek its consent to enter into a side deed to the lease with MIKK. The intention of the side deed is to ensure that MIKK is notified of any breaches or defaults of the lease conditions by ARCTC.

The side deed would require Council to provide MIKK with copies of any breach notices that Council issues to ARCTC in regards the lease for 1 Frederick Street. Please see Attachment 2 – Side Deed, for full details.

The proposed side deed allows the concurrent issue of any breach notifications to both ARCTC and MIKK, and stipulates a 60 day period from the date of the breach notice, before which Council is able to action the breach. It is considered that this is not an additional restriction to Council, as the lease currently provides a minimum 2 month period following the issue of the breach notice before which Council can action the breach, should the lessee not have resolved the issue of the breach notice in the meantime.

The proposed side deed would allow MIKK to remedy any breach/default on ARCTC's behalf, which must be to Council's satisfaction, and thus extinguish the breach/default notice.

The side deed places additional requirements on Council, such as:

- Council notifying MIKK in the event that ARCTC takes steps to amend, surrender or terminate the lease.
- Should Council decide to sell the property, it must use its best endeavours to ensure that the purchaser enters into a similar side deed with MIKK.
- Ensuring Council has appropriately undertaken the execution of the side deed and that Council has all the authorisations necessary to comply with the obligations of the deed.

The side deed requires that Council only need use its best endeavours to comply with its requirements, and acknowledges that Council will not incur any liability in damages in relation to any breach of any undertaking in relation to the deed.

The proposed side deed obliges MIKK to inform Council of the discharge of the mortgage, and the payment of Council's reasonable costs in relation to seeking legal advice in regards the deed.

It is considered that as the ground lease payment was paid in full as an upfront lump sum payment in 2008, the potential for the breach of an essential term of the lease is minimal.

Council's solicitors, Pikes Verekers, have reviewed the document and advised that while there is no obligation for Council to enter into the side deed, they did not consider that it placed any great additional onus on Council.

ARCTC have provided an undertaking to pay for Council's reasonable costs to date in the review and modification of the proposed side deed. ARCTC have further agreed to a payment to Council of \$200 per any notification letter that Council may need to issue during the term of the lease, to help defray Council's administration costs in so doing.

ARCTC have advised that their intention is to utilise a portion of the funding for the construction of a food court type facility on the premises. It is considered that this will not only benefit the patrons of Artarmon Home HQ, but will also provide a beneficial amenity to the local community and businesses.

5. CONCLUSION

While there is no legal obligation for Council to enter into the side deed, it doesn't invoke any significant additional imposition on Council and will allow ARCTC to fund alterations to the premises that will provide additional amenity to the local community.

As such, it is recommended that Council enter into the side deed to the lease for 1 Frederick Street, Artarmon, with MetLife Insurance K.K.

IMPLICATIONS	COMMENT
City Strategy Link:	4.1 Facilitate the development of all businesses
Business Plan Objectives, Outcomes/ Services	To facilitate the development of a city that is prosperous and vibrant.
Policy	N/A.
Consultation	N/A.
Resource	The execution of the document will be undertaken within existing resources.
Risk	The risk to Council has been assessed as being low.
Legal	Pikes Verekers were consulted in the consideration of the matter and for the preparation of the report.
Legislation	N/A.
Budget/Financial	Cost neutral - ARCTC have provided an undertaking to cover Council's reasonable legal costs in finalising the matter, as well as a payment of \$200 to Council for each notification letter that Council may issue, to help defray Council's administration costs in so doing.

Artarmon Retail Centre TC Pty Ltd
ACN 165 551 986
c/- Fortius Funds Management Limited
Level 4, 88 Phillip Street
Sydney NSW 2000

11 May 2018

Willoughby City Council

PO Box 57
Chatswood NSW 2057

Dear Sir

1 Frederick Street, Artarmon 2064 – lease to Artarmon Retail Centre TC Pty Limited

1. We refer to:
 - (a) registered lease AE10425H (**Lease**) dated 5 May 2008 between Willoughby City Council (**WCC**) as lessor and Artarmon Retail Centre TC Pty Limited (**ARCTC**) as lessee in respect of folio identifier 12/230974; and
 - (b) the loan agreement dated on or about the date of this letter between, among others, ARCTC in its capacity as trustee of the Artarmon Retail Centre Trust ABN 38 995 597 564 as borrower (**Borrower**) and MetLife Insurance K.K. (**Lender**) (**Loan Agreement**).
2. Clause 5.1 of the Lease provides as follows:

"The Lessee may assign, transfer or mortgage the Lease or sublet or part with the possession of the Premises or any part of it at any time during the Term of this Lease after providing notice in writing of the transaction to the Lessor within six (6) months after the transaction is effected."
3. In accordance with clause 5.1 of the Lease, ARCTC notifies WCC that the Borrower has granted:
 - (a) a real property mortgage over its leasehold interest in the Lease; and
 - (b) a general security deed over all its assets, rights and undertaking,each in favour of the Lender as part of the security package to be provided under the Loan Agreement.
4. By countersigning this letter WCC agrees for the benefit of the Lender that:
 - (a) WCC will provide to the Lender a copy of any written request it provides to ARCTC pursuant to clause 7.1 of the Lease (**Lease Notice**) at the same time the Lease Notice is provided to ARCTC;

1 Frederick Street, Artarmon 2064 - lease to Artarmon Retail Centre TC Pty Limited

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- (b) if WCC forms the opinion that the Borrower has breached or defaulted under the Lease and WCC intends to terminate the Lease, WCC agrees to promptly serve written notice of its intention on the Lender (**Breach Notice**), such notice to:
- (i) specify the basis on which WCC considers that the Borrower has breached or defaulted; and
 - (ii) specify how, in the reasonable opinion of WCC, the underlying breach or default can be remedied (whether by the performance of any remedial action or the payment of monetary compensation);
- (c) WCC will not terminate the Lease in respect of any breach or default by the Borrower under the Lease without first providing a Breach Notice to the Lender and giving the Lender not less than 60 days from the date the Breach Notice is received by the Lender (itself or through any other person) to remedy the Borrower's default or otherwise provide monetary compensation to the satisfaction of the WCC, (acting reasonably) in respect of the default;
- (d) if the Lender remedies the relevant breach or default under paragraph (c) above then the relevant Lease Notice will be of no further effect and for the purposes of clause 7.1 of the Lease ARCTC will not be deemed to have breached an essential term of the Lease (in respect of that breach or default);
- (e) WCC agrees that it will promptly notify the Lender if ARCTC takes steps under the Lease to amend, surrender or terminate the Lease;
- (f) WCC agrees that it will use its best endeavours, if it sells the premises leased under the Lease (**Premises**), to ensure the purchaser enters into a document with the Lender in the same terms as this document from the date of the transfer of the Premises;
- (g) that it has all authorisations necessary to enter into this document, comply with its obligations under it and allow it to be enforced; and
- (h) any notice from WCC to the Lender pursuant to the terms of this document (including any Lease Notice or Breach Notice) must be sent to the Lender at:

Address:	1-3, Kioicho, Chiyoda-ku, Tokyo, 102-8525, Japan
Attention:	Tsutomu Nakai and Chikashi Ando
Fax:	+81 3 6893 4446
Email:	nakaits@metlife.co.jp; andoch@metlife.co.jp; MetLife_Jpn_NonYenREI@metlife.co.jp

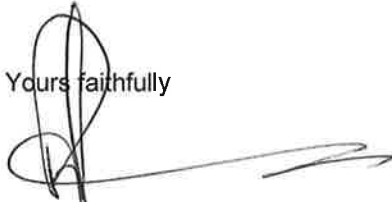
5. ARCTC and the Lender acknowledge that WCC will not incur liability in damages in relation to any breach of any undertaking in this document.
6. The Lender agrees to promptly inform WCC once the moneys secured under the Loan Agreement have been fully repaid and the security (including any mortgage in respect of the Lease) has been discharged.

1 Frederick Street, Artarmon 2064 - lease to Artarmon Retail Centre TC Pty Limited

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7. ARCTC agrees to pay WCC's reasonable costs in relation to seeking advice in respect of this document.

Should you have any questions, please do not hesitate to contact Tim Pearson on (02) 9236 4720.

Yours faithfully



Authorised Representative
Artarmon Retail Centre TC Pty Ltd

R J SPROATS

**EXECUTED as a deed by MetLife
Insurance K.K by affixing the corporate
seal of Metlife Insurance K.K.:**



Corporate Seal

Name: Sachin N. Shah

Title: Representative Statutory Executive
Officer, Chairman, President and Chief
Executive Officer

1 Frederick Street, Artarmon 2064 - lease to Artarmon Retail Centre TC Pty Limited

We acknowledge and agree to the matters mentioned in paragraph 4 of the above letter to us:

THE COMMON SEAL of **Willoughby City Council ABN 47 974 826 099** is duly affixed pursuant to a resolution of the Council at its meeting held on

Signature:

Signature:

Name:

Name:

Position:

Position: